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IN THE

Supreme Court of The United States

OCTOBER TERM, 1986

No. 86-1037

JOSEPH A. IERVOLINO,

Petitioner,

vs.

DELTA AIR LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

The petitioner, Joseph A. Iervolino ("Iervolino"), a former Captain for the respondent, Delta Air Lines, Inc. ("Delta"), brought this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 *et seq.*, claiming that Delta discriminated against him by refusing to allow him to serve as a Second Officer after reaching the age of sixty. The action was tried before a jury, and a verdict was returned for Delta. Iervolino's motion for judgment notwithstanding the verdict or for new trial was subsequently denied. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the trial court.

Iervolino's discrimination claim arises out of his attempt to sidestep the Federal Aviation Administration's "Age 60 Rule", which prohibits pilots from serving as pilot-in-command or co-pilot after their sixtieth

birthdays.[1] Shortly before turning sixty, Iervolino asked that Delta allow him to transfer from Captain to Second Officer, since the "Age 60 Rule" does not apply to the Second Officer position. Delta denied Iervolino's request, but offered him the opportunity to seek a non-flying position with Delta so that he could continue his employment. Iervolino never responded to this offer and subsequently retired upon reaching age sixty.[2]

In his lawsuit against Delta, Iervolino claimed that Delta discriminated against him on account of his age by refusing to grant his request to transfer ("downbid") to a Second Officer position. Delta's answer included the following defenses: (1) that age less than sixty is a bona fide occupational qualification ("BFOQ") for the position of Second Officer; and (2) that Delta's refusal to permit the two-step downbid was based on reasonable factors other than age ("RFOA"), specifically the "role reversal" problem associated with former senior Captains serving in the subordinate role of Second Officer.

At trial Delta introduced evidence supporting each of these defenses, thereby providing the jury two distinct bases for its verdict in favor of Delta. Regarding the BFOQ defense, two of Delta's expert witnesses testified concerning the decrements which occur at or around age sixty as a part of the "normal aging" process and the inability of medical science to predict susceptibility to incapacitating diseases or events.[3] Another expert, a psychiatrist, testified concerning the substantial "role reversal" problems which could occur if a former Captain

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[1] 14 C.F.R. 121.383(c); Tr. 913. The following abbreviations are used in this brief: "A " refers to the Appendix to Iervolino's Petition; "Tr. " refers to the pages of the trial transcript; "DX " refers to Delta's trial exhibits.

[2] DX 21; Tr. 235-36.

[3] Tr. 1026-44, 1078-82, 1089-90; Tr. 1330-39.

were permitted to serve as a Second Officer.[4] Delta also presented the testimony of many pilots who related the training and proficiency difficulties which pilots encounter as they approach and go beyond the age of sixty, as well as first-hand "role reversal" experiences.[5] Delta further supported each of its defenses with documentary evidence, including reports of the National Transportation Safety Board concerning actual airline incidents and accidents.[6]

As to its RFOA defense, Delta presented evidence of its long-standing policy against two-step biddowns from Captain to Second Officer regardless of age.[7] Delta also introduced the previously mentioned role reversal evidence to explain the basis for its policy.

In its instructions to the jury, the trial court assigned to Delta the burden of introducing evidence as to the RFOA defense and the burden of proof as to the BFOQ defense.[8] The trial court further charged the jury that in evaluating Delta's BFOQ defense it could consider whether certain non-age factors such as "the effect that allowing the plaintiff or others situated to serve as second officer would have on the safety of Delta's operations because of its effect on crew command structure, crew communication and crew concentration or any other similar reasons relating to safety."[9]

The trial court's BFOQ instruction adhered closely to the standard first enunciated in the 1976 Fifth Circuit

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[4] Tr. 1235-42.

[5] *See, e.g.*, Tr. 1686-87, 1706-25; Tr. 1760-72; Tr. 1805-33; Tr. 2093-2103; Tr. 2113-15; Tr. 2132-36.

[6] *See, e.g.*, DX 80, DX 81, DX 87, DX 92, DX 97.

[7] *See, e.g.*, Tr. 1688-90, 1849, 1893-96.

[8] A 40-42.

[9] A 43.

decision in *Usery v. Tamiami Trail Tours, Inc.*,[10] which this Court approved in *Western Air Lines, Inc. v. Criswell.*[11] Thus, the court informed the jury that to prevail on its BFOQ defense Delta had to prove (1) that its policy is reasonably necessary to the essence of Delta's business; and (2) that all or substantially all of the persons excluded by the policy would be unable to perform safely and efficiently as a Second Officer after age sixty, having previously served as a Captain, or that some persons excluded by the policy would be unable to perform safely and efficiently as Second Officers and it is impossible or highly impractical to determine on an individual basis which ones can safely perform.[12] Although the court also instructed the jury that the reasonableness of Delta's safety precautions was not to be judged by those of "other airlines," Iervolino was permitted to present substantial evidence regarding the practices of other airlines for the jury to consider in determining whether or not Delta's policy was reasonably necessary.

The trial court refused to give an instruction concerning "disparate impact" discrimination because Iervolino failed to assert such a claim in the pretrial order, despite several opportunities to do so.

On appeal, the Eleventh Circuit affirmed the judgment for Delta and the trial court's denial of Iervolino's motion for judgment notwithstanding the verdict or for new trial. Regarding the issues raised in Iervolino's petition to this Court as reasons for granting the writ, the Eleventh Circuit found:

> (1) Iervolino failed to object to the trial court's RFOA instruction, and it was not plain

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[10] 531 F.2d 224 (5th Cir. 1976).

[11] 472 U.S. 400, 86 L.Ed.2d 321, 335 (1985).

[12] A 42-43.

error to assign to Iervolino the burden of proof to rebut Delta's RFOA defense;

(2) the trial court did not commit reversible error by allowing Delta to establish a BFOQ based on factors other than age;

(3) the trial court's BFOQ instruction concerning reasonable necessity was proper, and its evidentiary ruling regarding the identities of other airlines was not reversible error; and

(4) the trial court properly refused to instruct the jury on the disparate impact theory as it was not included in the pretrial order.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SUBSTANTIAL CONFLICT AMONG THE CIRCUITS AS TO WHETHER AN EMPLOYER HAS THE BURDEN OF PROVING A "REASONABLE FACTORS OTHER THAN AGE" DEFENSE IN AN ADEA ACTION.

Iervolino argued on appeal below that the trial court improperly placed on him the burden of disproving Delta's RFOA defense. The Eleventh Circuit rejected this argument, noting that Iervolino never objected to the trial court's jury charge concerning the burden of proof with respect to that defense. Indeed, as the circuit court noted, "when the [trial] court questioned Iervolino's counsel about the appropriate allocation of the burden of proof on the RFOA defense, his counsel conceded that Delta had only the burden of production, not the burden of persuasion."[13]

Iervolino now seeks a writ of certiorari on this issue contending that there is a conflict among the circuits as to who has the burden of proof when an employer asserts an

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[13] A 10.

RFOA defense. Contrary to Iervolino's contention, however, there is not a sufficient conflict among the circuits to merit Supreme Court review.

The leading case addressing the issue is *Marshall v. Westinghouse Electric Corporation.*[14] In that case the Fifth Circuit recognized that the BFOQ defense is one which offers a legal justification for discrimination, whereas the RFOA defense is one which simply denies discrimination. Thus, the court ruled:

> To require a defendant to prove that differentiating factors other than age criteria were evenly applied to all similarly situated employees would require defendants to prove that the asserted cause was 'non-pretextual.' That requirement is inconsistent with prior case law under the ADEA. It is also inconsistent with Title VII case law. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). We think that reason as well as precedent supports our holdings and we repeat today that a defendant in an ADEA case bears only the burden of going forward with the evidence to demonstrate reasonable factors other than age for the plaintiff's discharge.[15]

Seven other circuits, in addition to the Eleventh Circuit in this case, are in accord with the *Westinghouse* deci-

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[14] 576 F.2d 588 (5th Cir. 1978).

[15] *Id.* at 592.

sion.[16] Only the Ninth Circuit has expressed a contrary view.[17] In *Criswell* the Ninth Circuit rejected Western Air Lines' contention that the district court improperly placed the burden of establishing an RFOA defense on the defendant. On certiorari, however, this Court found that the trial court did not place that burden on Western.[18] Therefore, the Ninth Circuit's opinion on the RFOA issue is dictum. Moreover, this dictum is contrary to prior Ninth Circuit precedent that the plaintiff "always retains the burden of persuasion" to prove discrimination based on age.[19]

Thus, there is no substantial conflict among the circuit courts which have addressed the RFOA burden of proof

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[16] *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011 (1st Cir. 1979); *Parcinski v. Outlet Company*, 673 F.2d 34, 36 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103, 74 L.Ed.2d 950 (1983); *EEOC v. Westinghouse Electric Corporation*, 725 F.2d 211, 222 (3rd Cir. 1983), *cert. denied*, 469 U.S. 820, 83 L.Ed.2d 38 (1984); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 920-21 (6th Cir. 1984); *Dale v. Chicago Tribune Company*, 797 F.2d 458, 462-64 (7th Cir. 1986); *Crimm v. Missouri Pacific Ry.*, 750 F.2d 703, 712-13 (8th Cir. 1984); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1429 (10th Cir. 1985).

In his petition to this Court, Iervolino states that the Third, Sixth, and Eighth, as well as district courts in the Seventh Circuit, "have determined that either the burden rests on the employer to prove the RFOA defense or that it is an 'affirmative defense.'" Iervolino Petition, pp. 9-10 n.3. This statement is misleading. The Third Circuit decision cited by Iervolino is *EEOC v. Westinghouse Electric Corporation, supra.* The court in that case, however, found that the defendant merely has the "burden of going forward" as to the RFOA defense, and the Fifth Circuit decision in *Marshall v. Westinghouse Electric Corporation, supra*, is cited for support. 725 F.2d at 222. Likewise, the Sixth Circuit in *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916 (6th Cir. 1984), held that the burden of proof on the RFOA defense falls to the plaintiff/employee. 742 F.2d at 920-21. The Eighth Circuit's recent decision in *Crimm v. Missouri Pacific Railway Company, supra*, also indicates that the burden should properly remain with the plaintiff/employee. 750 F.2d at 712-13.

[17] *See Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400, 86 L.Ed.2d 321 (1985).

[18] 86 L.Ed.2d at 330, n. 10.

[19] *See Sutton v. Atlantic Richfield Company*, 646 F.2d 407, 411-12 (9th Cir. 1981).

issue. That fact alone makes the issue inappropriate for review on certiorari. Certiorari is especially inappropriate in this case, however, since Iervolino waived the issue by failing to object to the trial court's jury instruction concerning the RFOA burden of proof.

II.

THE COURT BELOW PROPERLY FOUND THAT PERMITTING THE JURY TO CONSIDER NON-AGE FACTORS IN EVALUATING DELTA'S BFOQ DEFENSE WAS NOT REVERSIBLE ERROR.

In its decision below, the Eleventh Circuit did not decide whether a jury properly may consider non-age factors in connection with a BFOQ defense. In the court's view Delta's role reversal defense was properly before the jury in connection with Delta's RFOA defense, as to which Iervolino had the burden of proof. Therefore, allowing the jury to address role reversal in connection with Delta's BFOQ defense, as to which Delta had the burden of proof, was not harmful to Iervolino.

While the Eleventh Circuit did not elaborate further, the correctness of its conclusion is apparent. If the jury determined from Delta's role reversal evidence that Delta denied Iervolino's request to bid down to Second Officer based on "the effect that allowing the plaintiff or others [similarly] situated to serve as second officer would have on the safety of Delta's operations because of its effect on crew command structure, crew communication and crew concentration or any other similar reasons relating to safety,"[20] the jury would have been obliged to find for Delta based on its RFOA defense. Since the evidence authorized such a finding, it is immaterial that the jury

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[20] The quotation is from the trial court's jury instruction on the BFOQ defense. A 43.

may have deduced it in the context of a BFOQ defense rather than in the context of an RFOA defense.

Even if the court of appeals below had considered the issue and decided that Delta's role reversal evidence properly was part of its BFOQ defense, that decision would not have conflicted with the decisions of any other circuit. The cases cited by Iervolino do not require a different conclusion.

The decisions of the Seventh and Ninth Circuits referred to by Iervolino bar only the consideration of economic factors in connection with a BFOQ defense.[21] The Third and Fifth Circuit decisions cited by Iervolino do not address the issue.[22]

Similarly, the Fourth Circuit decision noted by Iervolino does not address this issue.[23] In *Smallwood*, the appellate court reversed the district court's finding that United Air Lines had

> . . . borne its burden of showing that there was a factual basis for its belief that 'all people over 35 would be unable to perform safely and efficiently the duties of flight officer' and that it would be impracticable to deal with each applicant on a case-by-case basis.[24]

Although United contended that hiring pilots over thirty-five would impair safety because the experience level of such pilots would interfere with United's "crew concept",

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[21] *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1042 (9th Cir. 1983), *cert. denied, County of Los Angeles v. EEOC*, 464 U.S. 1073, 79 L.Ed.2d 220 (1984); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 755 (7th Cir.), *cert. denied, Wauwatosa Fire Dept. v. Orzel*, 464 U.S. 992, 78 L.Ed.2d 680 (1983).

[22] *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); *EEOC v. County of Allegheny*, 705 F.2d 679 (3rd Cir. 1983).

[23] *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 308 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007, 73 L.Ed.2d 1302 (1982).

[24] 661 F.2d at 307.

the Fourth Circuit found no reliable evidence to support that contention.[25]

While the *Smallwood* court noted that the alleged harm to United's "crew concept" was a function of experience, not age, it did not hold that non-age factors could not be considered in connection with a BFOQ defense. In that case, United did not need to look to age to protect its "crew concept"; it could as easily have looked to the experience level of each applicant. That is not the situation in Delta's case.

One of Delta's concerns was the role reversal effect that might be encountered by permitting age sixty Captains (or for that matter any Captains) to transfer to the Second Officer position. Since every age sixty Captain is potentially subject to this adverse effect, the jury had to be permitted to consider Delta's evidence concerning role reversal in order to evaluate that aspect of Delta's BFOQ defense.

The opinion of the only circuit court to address this specific issue supports this view.[26] In *Johnson*, American Airlines submitted evidence that some former Captains would endanger flight safety by reverting to "captaincy behavior" during emergencies and that it was impossible to predict which ones would act in this way. The plaintiffs objected to this evidence, arguing that non-age factors can never be grounds for a BFOQ. Referring to the legislative history of the ADEA, the Fifth Circuit held that "the BFOQ defense need not relate solely to age and the ability to perform the assigned job."[27]

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[25] 661 F.2d at 308.

[26] *Johnson v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, U.S. , 87 L.Ed.2d 631 (1985).

[27] 745 F.2d at 993.

After the appeal was decided in *Johnson*, the plaintiff petitioned this Court for a writ of certiorari. One of the three issues raised in the petition was whether or not an employer could meets its burden of proving that age is a BFOQ with evidence based on factors other than age and ability to perform the particular job in question. This Court chose not to consider the issue and denied the petition.

Iervolino has offered no reason for the Court to now consider the very same issue it declined to consider in *Johnson*. None of the cases cited to justify consideration of the issue was decided after the denial of certiorari in *Johnson*. Moreover, the Eleventh Circuit below found it unnecessary to consider the issue in the context of this case. Thus, the Court should again deny certiorari.

III.

THE JURY INSTRUCTIONS AND EVIDENTIARY RULINGS WITH RESPECT TO DELTA'S BFOQ DEFENSE ADHERED TO THE STANDARD ESTABLISHED BY THIS COURT IN *WESTERN AIR LINES, INC. V. CRISWELL.*

Iervolino raises two additional issues regarding Delta's BFOQ defense: (1) whether the trial court improperly allowed Delta to base its BFOQ "upon a reasonableness standard;" and (2) whether the trial court erred in not allowing Iervolino to identify, by name, those airlines which permit flight engineers or second officers to serve after the age of sixty.

To properly evaluate the trial court's BFOQ instruction, one must consider the instruction in its entirety.[28] In the context of the whole charge, as the Eleventh Circuit observed below, the trial court properly articulated the

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[28] *Western, supra*, 86 L.Ed.2d at 337.

"reasonably necessary" standard approved in Western.[29] On three separate occasions during the BFOQ charge, the trial court informed the jury that Delta's policy must be "reasonably necessary" or must adhere to a standard of "reasonable necessity."[30] Moreover, the instruction concluded by reemphasizing the "reasonable necessity" standard.[31] Thus, the Eleventh Circuit determined that the proper standard was articulated despite the occasional references to "reasonableness."[32]

With respect to the airlines which have crew members over age sixty, the trial court did not entirely prohibit Iervolino from identifying them by name. The court specifically authorized Iervolino to identify for the jury those airlines which allow crew members to serve after age sixty as the result of a "voluntary business judgment" rather than as a reaction to litigation.[33] The Eleventh Circuit determined that even if this ruling was error, it was not reversible error.[34]

This Court in *Western* neither expressly authorized nor required the revelation of the identities of the "reputable businesses in the same industry that choose to eschew reliance on mandatory retirement earlier than age 70."[35]

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[29] *Id.* at 335. In framing the BFOQ standard, the *Western* opinion relied substantially upon the decision of the former Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (1976), which was the primary source for the BFOQ instruction in this case.

[30] Tr. 2824, 2830-32.

[31] Tr. 2832. Iervolino's counsel, in his closing argument, also stated the proper standard, as noted by the Eleventh Circuit. The appellate court also found it significant that Iervolino made no specific, timely objection to the trial court's use of the word "reasonableness."

[32] A 13.

[33] Pretrial Conference Transcript, pp. 37-42, 64.

[34] A 20-21.

[35] 86 L.Ed.2d at 336.

Indeed, to allow the identities to be revealed would serve no purpose other than to arouse the prejudices of the jury toward or against particular airlines, especially when the jury is not permitted to learn that most, if not all, of the airlines which adopted such a policy did so as a direct result of litigation or the threat of litigation.[36]

Iervolino could state no harm at the appellate level for this alleged error, and indeed there was none. The trial court allowed Iervolino to introduce an exhibit identifying, by name, each of the 485 pilots over the age of 60 who were at that time serving on other carriers and the equipment in which they flew. Moreover, several of these pilots testified as witnesses for Iervolino. Iervolino's counsel elicited from those witnesses information concerning the number and size of the airlines involved, and it was apparent that those airlines were major competitors of Delta.[37] Given this evidence, the fact that the specific airlines were not named could not have led "the jury to speculate that the numbers and size of those airlines . . . were small."[38] Thus, it was not reversible error to exclude the mere identities of those airlines when, pursuant to *Western*, the trial court allowed Iervolino to establish the "general practice and experience of the industry as a whole."[39]

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[36] Iervolino did not identify any airline which adopted its over-60 policy pursuant to a voluntary business judgment, despite the trial court's invitation.

[37] The pilots testified concerning the types of equipment flown by their airlines, the cities in which their airlines were based, the cities which their airlines served, the number of airplanes their airlines owned, the total number of pilots employed by their airlines, and even the number of flights per day flown by their airlines. *See* Tr. 84-85, 624-26, 632, 646, 651, 663-65, 682, 684-85, 691, 697-98. From the testimony of these pilots it was apparent that several different airlines were involved and that most of the airlines were international carriers. *Id.*

[38] Iervolino's Petition, p. 16.

[39] Iervolino's Petition, p. 16 (quoting the dissent in the decision below).

IV.

IERVOLINO FAILED TO PRESERVE THE DISPARATE IMPACT ISSUE AT TRIAL.

Iervolino failed to include specific reference to a disparate impact theory in either the "legal issues to be tried" or the "case outline" sections of the pretrial order. As noted in the decision below, at the pretrial conference the trial court made abundantly clear the purpose of those sections and the need for the parties to specifically state their claims and defenses. The trial court even allowed the parties to supplement the pretrial order with any additional claims or defenses which they intended to raise during the trial, and both parties did so. Nonetheless, Iervolino failed to include a disparate impact theory in his supplementation.

The trial court cautioned the parties at the pretrial conference that any claim or defense not included in the pretrial order after the supplementation would be deemed waived: "[I]f your theory or theories of liability or your theory or theories of defense and your measures of damages are not listed [in the case outlines], they don't exist."[40] The court further cautioned: "What I'm trying to get is to get the final contentions and the demands . . . all in one place."[41]

Iervolino contends that his references to provisions of the ADEA (29 U.S.C. §§ 623(a)(1) and 623(a)(2)) provided adequate specification of the disparate impact theory. This contention is belied by Iervolino's counsel's own statement to the trial court that the statute does not provide notice of the disparate impact theory.[42] Moreover,

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[40] Pretrial Conference Transcript, pp. 129-30.

[41] *Id.* at 133-34.

[42] Tr. 2709.

as observed by the Eleventh Circuit, any evidence offered during trial which was relevant to a disparate impact theory also was relevant to disparate treatment. Thus, there was no trial of the issue by "implied consent", as Iervolino asserts.[43]

Iervolino also maintains that he submitted a "statement of contentions" on the first day of trial which included the disparate impact theory. This "statement of contentions", however, was intended as a cover page for the parties' requests to charge and was only to be used, in the court's discretion, as a reference for the court in instructing the jury.[44] It was not a part of the pretrial order, which was finalized well before trial.

It was not an abuse of discretion for the trial court to refuse to permit a disparate impact instruction when the theory was not included in the pretrial order. Two recent decisions of the Eleventh Circuit underscore the need for adherence to pretrial order requirements. In *Woods v. Burlington Northern Railway Company*,[45] the court stated that counsel "cannot show cavalier disregard" for pretrial order requirements and that theories not included in the pretrial order can properly be excluded.[46] In *Randolph County v. Alabama Power Company*,[47] the court held: "The

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[43] It should be noted that Iervolino's purported disparate impact claim is in fact only a denial of Delta's RFOA defense in that he maintains that Delta's policy against Captains bidding down to Second Officer applies only to those nearing the age of sixty. *See* Iervolino's initial brief in the Eleventh Circuit, p. 36. Indeed, the only evidence which Iervolino offered concerning the effect of Delta's policy on older Captains was the fact that only three Delta Captains, including Iervolino, had ever attempted to bid down to Second Officer as they approached age sixty. Tr. 882-883.

[44] Pretrial Conference Transcript at 213.

[45] 768 F.2d 1287 (11th Cir. 1985), *cert. granted other grounds,* U.S. , 106 S. Ct. 1456 (1986).

[46] 768 F.2d at 1291.

[47] 784 F.2d 1067 (11th Cir. 1986).

parties are bound by their agreement to so limit issues and may not introduce at trial issues excluded in the pretrial order. [Citations omitted]. It is within the judge's discretion to exclude those matters not set forth . . . ."[48] Respect for pretrial order requirements is found not only in the Eleventh Circuit, but in the other circuits as well.[49] Therefore, the decision below properly upheld the trial court's enforcement of its pretrial order requirements.

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[48] *Id.* at 2434.

[49] *See, e.g., McKinney v. Galvin*, 701 F.2d 584, 586 n.3 (6th Cir. 1983); *Allen v. U.S. Steel Corporation*, 665 F.2d 689, 696 (5th Cir. 1982); *Iowa-Mo Enterprises, Inc. v. Avren*, 639 F.2d 443, 447 (8th Cir. 1981); *Southwestern Stationery and Bank Supply, Inc. v. Harris Corporation*, 624 F.2d 168, 171 (10th Cir. 1980).

CONCLUSION

For the reasons stated above, the Court should deny the Petition For a Writ of Certiorari.

Respectfully submitted,

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